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In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The Child Online Protection Act (COPA) makes it unlawful to make any communication for commercial purposes by means of the World Wide Web that is available to minors and that includes material that is "harmful to minors," unless good faith efforts are made to prevent children from obtaining access to such material. 47 U.S.C. 231(a)(1) and (c)(1) (Supp. V 1999). COPA relies in part on "community standards" to identify material that is "harmful to minors." 47 U.S.C. 231(e)(6) (Supp. V 1999). The question presented is whether the court of appeals properly barred enforcement of COPA on First Amendment grounds because the statute relies on community standards to identify material that is harmful to minors.

PARTIES TO THE PROCEEDINGS

Petitioner is John Ashcroft, Attorney General of the United States. Respondents are American Civil Liberties Union, Androgyny Books, Inc. d/b/a/ a Different Light BookStores, American Booksellers Foundation for Free Expression, Artnet Worldwide Corp., Backstripe, Addazi Inc. d/b/a Condomania, Electronic Frontier Foundation, Electronic Privacy Information Center, Free Speech Media, Internet Content Coalition, OBGYN.net, Philadelphia Gay News, Planetout Corporation, Powell's Bookstore, Riotgrrl, Salon Internet, Inc., and West Stock, Inc.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 217 F.3d 162. The opinion of the district court granting respondents' motion for a preliminary injunction (Pet. App. 40a-100a) is reported at 31 F. Supp. 2d 473. The opinion of the district court granting respondents' application for a temporary restraining order (Pet. App. 101a-114a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2000. A petition for rehearing was denied on September 15, 2000 (Pet. App. 124a-125a). On December 5, 2000, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including January 15, 2001. On January 9, 2001, Justice

Souter further extended the time within which to file a petition for a writ of certiorari to and including February 12, 2001. The petition for a writ of certiorari was filed on February 12, 2001, and was granted on May 21, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law * * * abridging the freedom of speech, or of the press." The pertinent provisions of the Child Online Protection Act are reprinted in the appendix to the petition for a writ of certiorari. Pet. App. 115a-123a.

STATEMENT

1. Pornographic material, from "the modestly titillating to the hardest-core," is "widely available" on the Internet. *Reno* v. *ACLU*, 521 U.S. 844, 853-854 (1997). In 1998, there were approximately 28,000 pornographic sites on the World Wide Web (Web), and those sites generated approximately $925 million in annual revenues. H.R. Rep. No. 775, 105th Cong., 2d Sess. 7 (1998). Pornographic Web sites often offer "teasers"—free pornographic images designed to entice users to pay a fee to explore the whole site. H.R. Rep. No. 775, *supra*, at 10; Pet. App. 41a.

Because Web software is easy to use, "minors who can read and type are capable of conducting Web searches as easily as operating a television remote." H.R. Rep. No. 775, *supra*, at 9-10. As a result, pornographic material on the Internet is "widely accessible" to minors. *Id.* at 9. While many children deliberately search for pornographic Web sites, others accidentally

stumble upon them. *Id.* at 10. Searches using common terms such as toys, girls, boys, beanie babies, bambi, and doggy all lead directly to pornographic sites. *Ibid.*

Pornography is harmful to children because it does not provide them with a normal sexual perspective. H.R. Rep. No. 775, *supra*, at 11. It teaches without supervision or guidance, "inundating children's minds with graphic messages about their bodies, their own sexuality, and those of adults and children around them." *Id.* at 11. Moreover, "[t]he prevalence of violent, abusive, and degrading pornography can induce beliefs that such practices are not only common, but acceptable." S. Rep. No. 225, 105th Cong., 2d Sess. 2-3 (1998).

2. Congress first addressed the harmful effects of pornographic material on the Internet in the Communications Decency Act of 1996 (CDA), Pub. L. No. 104-104, § 502, 110 Stat. 133. The CDA prohibited the transmission to minors over the Internet of "indecent" messages, 47 U.S.C. 223(a) (Supp. V 1999), as well as the display, in a manner available to minors, of material that is "patently offensive" as measured by "contemporary community standards," 47 U.S.C. 223(d)(1) (Supp. V 1999). The CDA provided a defense to prosecution to persons who conditioned access to covered material on proof of adult status, or who limited minors' access through other reasonable and effective means. 47 U.S.C. 223(e)(5) (A) and (B) (Supp. V 1999).

In *Reno* v. *ACLU*, this Court held that the CDA's regulation of "indecent" and "patently offensive" speech violated the First Amendment. The Court reaffirmed that government has "'a compelling interest in protecting the physical and psychological well-being of minors' which extend[s] to shielding them from indecent messages that are not obscene by adult standards."

521 U.S. at 869. It concluded, however, that the government had failed to demonstrate that the CDA was the least restrictive alternative available to further that compelling interest. *Id.* at 879.

In defending the constitutionality of the CDA, the government relied on *Ginsberg* v. *New York*, 390 U.S. 629 (1968), which upheld the constitutionality of a state statute that prohibited the sale to minors of magazines that were obscene as to minors, but not as to adults. The Court distinguished the CDA from the "harmful-to-minors" statute upheld in *Ginsberg* on four grounds. *Reno* v. *ACLU*, 521 U.S. at 865-866, 877-878. First, the statute upheld in *Ginsberg* did not prohibit parents from purchasing material for their children, while the CDA made no such exception. *Id.* at 865, 878. Second, the statute upheld in *Ginsberg* applied only to commercial transactions, while the CDA contained no such limitation. *Id.* at 865, 877. Third, the statute upheld in *Ginsberg* expressly did not apply to material that had redeeming value for minors, whereas the CDA did not define "indecent" and "patently offensive," and omitted any requirement that the material lack serious value for minors. *Ibid.* Fourth, the statute upheld in *Ginsberg* defined a minor as a person under the age of 17, whereas the CDA applied to persons under 18 years. *Id.* at 865-866, 878. In connection with the third distinction—that the CDA failed to define its key terms and covered material having serious value for minors—the Court also observed that the "'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." *Id.* at 877-878.

Because of the breadth of the CDA's coverage, the Court also rejected the government's argument that

the CDA's affirmative defenses created sufficient opportunities for adult-to-adult communication. The Court relied on the district court's findings that there was no effective way to determine the age of a user who seeks access to material through e-mail, mail exploders, newsgroups, or chat rooms, and that it would be prohibitively expensive for noncommercial Web sites to verify that their users were adults. *Reno* v. *ACLU*, 521 U.S. at 876-877.

3. Congress reexamined the problem of minors' access to pornographic material on the Internet in light of *Reno* v. *ACLU*. Both the House of Representatives and the Senate conducted hearings on the subject. See *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Hearings on H. R. 3783, H.R. 774, H.R. 1180, H.R. 1964, H.R. 3177, and H.R. 3442 Before the Subcomm. on Telecomms., Trade and Consumer Protection of the House Comm. on Commerce*, 105th Cong., 2d Sess. (1998); *Internet Indecency: Hearing Before the Senate Comm. on Commerce, Sci. and Transp.*, 105th Cong., 2d Sess. (1998). Following those hearings, Congress enacted, and the President signed into law, the Child Online Protection Act (COPA), Pub. L. No. 105-277, Div. C, §§ 1401-1406, 112 Stat. 2681-736 to 2681-741 (codified at 47 U.S.C. 231 (Supp. V 1999)).

a. Congress enacted legislative findings that explain the basis for COPA. Congress found that there continue to be "opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision and control." 47 U.S.C. 231 note (Supp. V 1999) (Finding 1). Congress further determined that "protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling gov-

ernmental interest." 47 U.S.C. 231 note (Supp. V 1999) (Finding 2). Congress noted that "the industry has developed innovative ways to help parents and educators restrict material that is harmful to minors through parental control protections and self-regulation." 47 U.S.C. 231 note (Supp. V 1999) (Finding 3). It found, however, that "such efforts have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web." *Ibid.* Congress therefore concluded that "a prohibition on the distribution of material harmful to minors, combined with legitimate defenses, is currently the most effective and least restrictive means by which to satisfy the compelling government interest." 47 U.S.C. 231 note (Supp. V 1999) (Finding 4).

b. COPA subjects to criminal and civil sanctions any person who "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U.S.C. 231(a)(1) (Supp. V 1999). A person communicates "for commercial purposes" only if he "is engaged in the business of making such communications," 47 U.S.C. 231(d)(2)(A)—*i.e.*, if he "devotes time, attention, or labor" to making harmful-to-minor communications "as a regular course of [his] trade or business, with the objective of earning a profit as a result of such activities." 47 U.S.C. 231(e)(2)(B) (Supp. V 1999).

COPA defines "material that is harmful to minors" as "any communication, picture, image, graphic image file,

article, recording, writing, or other matter of any kind" that is "obscene" or that

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. 231(e)(6) (Supp. V 1999). A "minor" is defined as any person under the age of 17. 47 U.S.C. 231(e)(7) (Supp. V 1999).

COPA's definition of nonobscene material that is "harmful to minors" parallels the three-part "harmful to minors" standard approved in *Ginsberg*. H.R. Rep. No. 775, *supra*, at 13, 27-28. It also tracks the standard that is used in many state laws that prohibit the public display of material that is harmful to minors and that effectively require such material to be placed behind a blinder rack, in a sealed wrapper, or in an opaque cover. H.R. Rep. No. 775, *supra*, at 13. COPA expressly provides that the question whether material is designed to appeal to the "prurient interest" shall be determined according to "community standards," 47 U.S.C. 231(e)(6)(A) (Supp. V 1999). With respect to the other two prongs, Congress intended for its definition "to parallel the *Ginsberg* and *Miller* definitions of obscenity

and harmful to minors, as those definitions were later refined in *Smith* v. *United States*, 431 U.S. 291, at 300-02, 309 (1977) and *Pope* v. *Illinois*, 481 U.S. 497, at 500-01 (1987)." H.R. Rep. No. 775, *supra*, at 27-28. Under that line of cases, "prurient interest" and "patent offensiveness" are determined according to "community standards," but "serious value" is determined under a "reasonable person" test, and not according to "community standards." *Pope* v. *Illinois*, 481 U.S. 497, 500-501 & n.3 (1987). Congress regarded "community standards" as "reasonably constant among adults in America with respect to what is suitable for minors." H.R. Rep. No. 775, *supra*, at 28.

COPA provides "an affirmative defense to prosecution" if a person engaged in the business of making harmful-to-minors communications, "in good faith, has restricted access by minors to material that is harmful to minors." 47 U.S.C. 231(c)(1) (Supp. V 1999). To qualify for the defense, the person may (A) "requir[e] use of a credit card, debit account, adult access code, or adult personal identification number," (B) "accept[] a digital certificate that verifies age," or (C) use "any other reasonable measures that are feasible under existing technology." 47 U.S.C. 231(c)(1) (Supp. V 1999).

c. In crafting COPA, Congress sought to "address[] the specific concerns raised" by this Court when it invalidated the CDA in *Reno* v. *ACLU*, and to track more closely the statute upheld in *Ginsberg*. H.R. Rep. No. 775, *supra*, at 12-16; S. Rep. No. 225, *supra*, at 2, 5-6. Six changes are significant.

First, the CDA applied to communications other than those made by means of the Web, including communications made by e-mail, newsgroups, and chat rooms, *Reno* v. *ACLU*, 521 U.S. at 851, and age screening was found not to be technologically feasible for those forms

of communication, *id.* at 876-877. In contrast, COPA applies only to material that is communicated by means of the Web, 47 U.S.C. 231(a)(1) (Supp. V 1999), where age screening is both technologically feasible and economically affordable. H.R. Rep. No. 775, *supra*, at 13-14.

Second, the CDA applied to materials that were "indecent" or "patently offensive," without defining either term and without making clear whether the "indecent" and "patently offensive" determinations should be made with respect to adults or minors. *Reno* v. *ACLU*, 521 U.S. at 871 & n.37, 873, 877. In contrast, COPA identifies the particular sexual activities and anatomical features depiction of which may be found to be "patently offensive," and makes clear that the determination whether material containing such a depiction is "patently offensive" shall be made "with respect to minors." 47 U.S.C. 231(a)(1) and (e)(6)(B) (Supp. V 1999).

Third, the CDA did not require that the covered material "appeal to the prurient interest" or lack "serious value." It therefore covered vast amounts of non-pornographic materials having serious value, including material containing any of the seven "dirty words" used in the monologue at issue in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), discussions about prison rape or safe sexual practices, artistic images of nude subjects, and arguably the card catalog of the Carnegie Library. *Reno* v. *ACLU*, 521 U.S. at 873, 877-878. In contrast, COPA contains all three prongs of the *Ginsberg* test. Thus, by its terms, COPA applies only to material that, "taken as a whole and with respect to minors," is designed to appeal to the "prurient interest," and that, "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6)(A) and (C) (Supp. V 1999).

Fourth, the CDA applied not only to commercial transactions, to which the statute in *Ginsberg* was limited, but also to all nonprofit entities and to individuals posting messages on their own computers. It therefore included categories of speakers who might not have been able to afford the costs of age screening. *Reno* v. *ACLU*, 521 U.S. at 856, 877. In contrast, COPA applies only to persons engaged in business who make harmful-to-minors Web communications "for commercial purposes," 47 U.S.C. 231(a)(1) (Supp. V 1999), "as a regular course" of their businesses, 47 U.S.C., 231(e)(2)(B) (Supp. V 1999). Such persons, Congress determined, can afford the costs of compliance. H.R. Rep. No. 775, *supra*, at 13-5.

Fifth, the CDA made it unlawful for parents to permit their children to use the family computer to view covered material. *Reno* v. *ACLU*, 521 U.S. at 865, 878. In contrast, COPA contains no such intrusion on the parent-child relationship. H.R. Rep. No. 775, *supra*, at 15; S. Rep. No. 225, *supra*, at 6.

Sixth, the CDA defined a minor as any person under 18 years of age, thereby including some persons in their first year of college. *Reno* v. *ACLU*, 521 U.S. at 865-866, 878. In contrast, COPA defines "minor" as "any person under 17 years of age." 47 U.S.C. 231(e)(7) (Supp. V 1999).

4. Immediately after COPA was signed into law, the American Civil Liberties Union and others (respondents) filed suit in federal district court to challenge it. Respondents alleged that COPA violates the First and Fifth Amendments to the Constitution, and they sought to enjoin its enforcement. Pet. App. 12a & n.13, 42a. The district court entered a temporary restraining order prohibiting the government from enforcing the

Act, *id.* at 112a, and that order was extended for a brief period by agreement of the parties, *id.* at 42a-43a.

The day the TRO was set to expire, the district court entered a preliminary injunction prohibiting the government from enforcing COPA. Pet. App. 42a-43a, 98a. Although the court determined that respondents were likely to prevail on their First Amendment claim, many of the court's findings and conclusions support COPA's constitutionality. For example, the district court found that pornographic material is widely available to minors who "surf" the Web. *Id.* at 41a. The court also held that the government has a compelling interest in protecting minors from harmful material on the Web that is not obscene by adult standards. *Id.* at 90a.

The court further found that adult identification systems permit Web site operators to prevent minors from obtaining access to harmful materials, while still offering such materials to adults. Pet. App. 71a. The court noted that Adult Check provides, at no cost to a Web site operator, a screen that can be used to block access by minors. *Id.* at 75a. An adult who comes across such a screen may click on a link to the Adult Check site, immediately purchase a Personal Identification Number (PIN) for an annual fee of $16.95, return to the original site, and use the PIN to obtain access to the site. *Id.* at 75a-76a. The court cited testimony that approximately three million people possess a valid Adult Check PIN, and 46,000 Web sites accept them. *Id.* at 76a. Despite those findings, the district court determined that respondents were likely to show that COPA imposes an impermissible burden on speech that is protected for adults. *Id.* at 90a. In support of that conclusion, the court found only that respondents were likely to establish at trial that the placement of adult screens in front of harmful-to-minor materials "may

deter" users from seeking access to such materials, which "may affect" the speakers' economic ability to provide such communications. *Id.* at 89a.

The district court also found that the voluntary use of "blocking" technology might be "at least as successful as COPA" in restricting minors' access to harmful material without imposing the same burdens on constitutionally protected speech. Pet. App. 94a. The court acknowledged that blocking software is both over- and under-inclusive—it blocks some sites that contain no harmful material, and permits access to some sites that contain such material. *Ibid.* The court also noted that "[i]t is possible that a computer-savvy minor with some patience would be able to defeat the blocking device," and that "a minor's access to the Web is not restricted if [that minor] accesses the Web from an unblocked computer." *Id.* at 82a. The court found it more significant, however, that blocking software can block harmful material not covered by COPA, such as material on foreign Web sites and material outside the Web. *Id.* at 94a.

5. The court of appeals affirmed the district court's preliminary injunction. Pet. App. 1a-39a. It did so, however, on a ground upon which the district court had not relied, the parties had not briefed on appeal, and the court of appeals had raised for the first time at oral argument. *Id.* at 21a, 22a n.19.

Like the district court, the court of appeals held that "the government has a compelling interest in protecting children from material that is harmful to them, even if not obscene by adult standards." Pet. App. 20a. Unlike the district court, the court of appeals did not question the government's ability to demonstrate that COPA is the least restrictive means available to further that compelling interest. Thus, the court of appeals rejected

the district court's reliance on the voluntary use of blocking software as a less restrictive alternative (*id.* at 15a n.16); it acknowledged that, in enacting COPA, Congress had sought to address the "specific concerns" raised in *Reno* v. *ACLU* (*id.* at 6a); and it assumed for purposes of its decision that "there may be no other means by which harmful material on the Web may be constitutionally restricted" (*id.* at 3a). The court held, however, that "[t]he State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations," *id.* at 33a (citation omitted), and it concluded that "regulation under existing technology is unreasonable here," *id.* at 34a.

The court of appeals based that finding of unreasonableness on COPA's "reliance on 'contemporary community standards' in the context of the electronic medium of the Web to identify material that is harmful to minors." Pet. App. 21a. The court held that COPA's reliance on community standards, "in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech." *Id.* at 3a.

The court of appeals noted that in *Reno* v. *ACLU*, this Court had pointed out that "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." Pet. App. 22a (quoting 521 U.S. at 877-878). The court then determined that "Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users," making all content posted on the Web available to a nationwide audience. *Id.* at 24a. As a result, the court reasoned, "to avoid

liability under COPA, affected Web publishers would either need to severely censor their publications or implement an age or credit card verification system whereby any material that might be deemed harmful by the most puritan of communities in any state is shielded behind such a verification system." *Id.* at 24a-25a. If Web publishers were to choose to comply through age screening, the court noted, it "would prevent access to protected material by any adult * * * without the necessary age verification credentials." *Id.* at 25a. Based on those considerations, the court concluded that COPA "imposes an overreaching burden and restriction on constitutionally protected speech." *Id.* at 29a.

The court of appeals acknowledged that in *Hamling* v. *United States*, 418 U.S. 87 (1974), and *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115 (1989), this Court upheld the application of varying community standards to persons whose commercial conduct had effects in different geographic areas. Pet. App. 25a-26a. It distinguished those cases, however, on the ground that the parties involved "had the ability to control the distribution of controversial material with respect to the geographic communities into which they released it." *Id.* at 26a.

SUMMARY OF ARGUMENT

This Court has repeatedly held that the government has a compelling interest in protecting children from material that is harmful to them, even if it is not obscene for adults. The court of appeals in this case agreed with that fundamental proposition. Furthermore, the court of appeals assumed for purposes of its decision that the Child Online Protection Act represents the least restrictive alternative to further that

compelling interest, and that there may be no other means by which harmful material on the Web may be constitutionally restricted. The court nonetheless held that COPA's reliance on community standards to determine whether material is harmful to minors imposes an impermissible burden on protected speech. This Court, however, has long approved the use of community standards as a central component of obscenity and harmful-to-minors statutes, and has viewed them as furnishing an indispensable First Amendment safeguard.

A. COPA's harmful-to-minors standard is firmly grounded in widely accepted and constitutionally sound state harmful-to-minors laws. In *Ginsberg* v. *New York*, 390 U.S. 629, 641 (1968), this Court upheld the constitutionality of a state law that prohibited the sale to minors of "harmful" material, explaining that it constitutionally advances the state's interest in shielding minors from material that impairs their moral development.

Since *Ginsberg*, many States have also prohibited the public display of material that is harmful to minors. Such laws effectively require pornographic magazines such as Hustler, Penthouse, and Playboy to be placed behind blinder racks, in a sealed wrapper, or otherwise shielded from minors. Courts of appeals and state courts have regularly upheld such state display laws, rejecting claims that they impermissibly interfere with adult access to protected speech.

Pornographic material is so widely available on the World Wide Web that it threatens to render state blinder laws largely meaningless. To address that serious problem, COPA requires commercial entities that regularly display harmful-to-minors material to place behind age verification screens the same kind of material covered by state blinder laws.

B. The court of appeals singled out COPA's reliance on community standards as constitutionally flawed. But community standards have long been a component of both state harmful-to-minors laws and state and federal obscenity laws. Far from treating a reliance on community standards as constitutionally suspect, this Court has viewed community standards as furnishing an indispensable First Amendment safeguard. As explained in *Miller* v. *California*, 413 U.S. 15, 33 (1973), reliance on community standards ensures that material is assessed in terms of its effect on an average person, rather than on an unusually susceptible one.

C. The court of appeals rested its condemnation of community standards on a finding that Web businesses cannot prevent material from reaching particular geographic areas, effectively forcing those businesses to conform to the standards of the most puritan community. There are ways for Web businesses to limit their material to particular geographic areas. Even if we assume, however, that Web businesses must conform to community standards throughout the country, that would not render COPA unconstitutional.

The inevitable consequence of *Miller*'s approval of community standards is that a commercial entity that chooses to operate a business on a nationwide medium must observe community standards throughout the nation. There is nothing unreasonable about that consequence. A commercial entity that regularly displays harmful-to-minors material on a nationwide medium obtains the advantages of a nationwide market for its profit-making activities. It is entirely reasonable to require businesses that have made that choice, and have reaped the associated economic advantages, to make sure that their business activities do not cause

harm to minors in the communities from which they seek to profit.

In *Hamling* v. *United States*, 418 U.S. 87 (1974), and *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115 (1989), this Court held that commercial entities that distribute possibly obscene material to multiple communities have the responsibility to ensure that their commercial activities are lawful in each of the affected communities. The principle involved in those cases is equally applicable here.

D. The court of appeals rested its holding in large part on its view that COPA's reliance on community standards requires vast amounts of material to be placed behind age verification screens. In reaching that conclusion, however, the court ignored the serious value prong of the harmful-to-minors statute. That prong of the statute does not incorporate community standards, and it excludes from coverage as a matter of law material that has serious value for a legitimate minority of older minors. The serious value prong of the statute, together with the legal limitations imposed by the other two prongs, confines COPA's reach to material that is clearly pornographic, and excludes from coverage material that contains explicit but serious discussions of sexual issues.

E. The constitutionality of COPA's reliance on community standards is further supported by Congress's judgment that community standards are reasonably constant throughout the country. The exhibits introduced in this case confirm that common-sense judgment. They illustrate that, as to material that is not excluded from coverage as a matter of law, there is unlikely to be much variance throughout the nation on the question whether the material appeals to the prurient interest and is patently offensive with respect

to minors. Congress's intent that juries would be instructed to apply community standards without geographic specification further promotes a reasonably constant application of community standards.

F. COPA's reliance on community standards does not impose an undue burden on speech. The Act is directed primarily to commercial pornographers who already put most of their material behind age verification screens. The principal effect of the Act is to require those commercial pornographers to put their teasers behind age verification screens as well. COPA's reliance on community standards also does not impose an undue burden on other businesses that regularly display material that may be harmful to minors. As to material that lacks serious value for a legitimate minority of older minors, such businesses could reasonably anticipate that juries in different communities would react similarly to the material.

To the extent that there remains any meaningful variance in community standards, however, businesses that regularly display possibly harmful material would simply need to place somewhat more material behind an age verification screen. At least one adult verification service (Adult Check) will set up an adult verification system at no cost to the Web site. Moreover, as of the time of the district court's decision, an adult identification number could be purchased for less than $20 per year, and millions of adults had purchased adult IDs. At most, COPA's reliance on community standards imposes a modest burden on adult access to pornographic material, and that modest burden is outweighed by the government's compelling interest in shielding minors from material that is harmful to them.

G. In *Reno* v. *ACLU*, the Court noted that one feature of the CDA was that the community standards

criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended. 521 U.S. at 877-878. The Court made that observation, however, in connection with a statute that it found to be of unprecedented vagueness and breadth, and that was not limited to material that was harmful to minors, for which Congress determined in enacting COPA that community standards are reasonably constant throughout the United States. In COPA, Congress responded directly to the Court's concern about the unprecedented breadth and undefined parameters of the CDA. In contrast to the CDA, COPA's coverage is both narrow and well-defined. In the context of that very different statute, a reliance on community standards does not raise independent constitutional concerns.

ARGUMENT

THE CHILD ONLINE PROTECTION ACT'S RELIANCE ON COMMUNITY STANDARDS DOES NOT VIOLATE THE FIRST AMENDMENT

COPA makes it unlawful for a person engaged in business to make communications for commercial purposes by means of the World Wide Web that are available to minors and that regularly include material that is "harmful to minors." 47 U.S.C. 231(a)(1) and (e)(2) (Supp. V 1999). The Act affords a defense to prosecution if access to "harmful-to-minors" material is conditioned on verification of adult status or if other good faith efforts are made to prevent minors from obtaining access to such material. 47 U.S.C. 231(c)(1) (Supp. V 1999). COPA uses a three-part test to determine whether material is harmful to minors: the material must (A) taken as a whole, be designed to

appeal to the "prurient interest" of minors, (B) depict sexual acts or contact or specified parts of the anatomy in a manner that is "patently offensive" with respect to minors; and (C) taken as a whole, "lack[] serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6) (Supp. V 1999). The first two inquiries—prurient interest and patent offensiveness—are to be decided from the perspective of "the average person" applying "contemporary community standards." 47 U.S.C. 231(e)(6)(A) (Supp. V 1999); see pp. 7-8, *supra*. Congress understood "community standards" to be "reasonably constant among adults in America with respect to what is suitable for minors." H.R. Rep. No. 775, *supra*, at 28. The "serious value" prong has a "reasonable person" test that does not incorporate community standards. See pp. 7-8, *supra*.

COPA regulates speech based on its content. Accordingly, in order to survive constitutional scrutiny, it must be supported by a compelling interest, and it must be the least restrictive alternative available to further that interest. *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000); *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). The court of appeals did not suggest that COPA failed either of those requirements. To the contrary, the court held that "the government has a compelling interest in protecting children from material that is harmful to them, even if not obscene by adult standards," Pet. App. 20a, and it assumed for purposes of its decision that "there may be no other means by which harmful material on the Web may be constitutionally restricted," *id.* at 3a. The court of appeals nonetheless held that COPA's reliance on "community standards" to help identify material that is harmful to minors "imposes an overreaching burden and restriction on constitutionally

protected speech." *Id.* at 29a; see also *id.* at 2a-3a, 21a, 34a. That holding is incorrect. COPA's reliance on community standards does not violate the First Amendment.

A. COPA's Harmful-to-Minors Standard Is Modeled On State Harmful-to-Minors Laws That Have Been Held Constitutional

1. COPA's harmful-to-minors standard has its origins in statutes that prohibit the sale to minors of material that is "harmful" to them. This Court addressed the constitutionality of such a statute in *Ginsberg* v. *New York*, 390 U.S. 629 (1968). The harmful-to-minors statute at issue in *Ginsberg* covered "any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when it":

> (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and
>
> (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and
>
> (iii) is utterly without redeeming social importance for minors.

Id. at 646. The Court described the New York statute as covering "'girlie' picture magazines" that are not obscene by adult standards, but are obscene with respect to minors. *Id.* at 634.

With that understanding of the limited reach of the statute, the Court upheld its constitutionality, stating that "[w]e do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors'

constitutionally protected freedoms." *Ginsberg*, 390 U.S. at 638. The Court explained that "[t]he legislature could properly conclude" that parents who have "primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility," *id.* at 639, "[t]he State also has an independent interest in the well-being of its youth," *id.* at 640, and the legislature was entitled to regard the material covered by the statute as "impairing the ethical and moral development" of minors, *id.* at 641.

2. At the time of *Ginsberg*, nearly every State had a prohibition on the sale to minors of "harmful-to-minors" material. 390 U.S. at 647-648. Those state laws, or slight modifications of them, remain in effect today. See Addendum I, *infra*, 1a-2a. Many States have found, however, that a sale prohibition is insufficient to vindicate their interest in shielding minors from the harmful effects of pornographic materials, such as the pornographic photographs that appear in Hustler, Penthouse, and Playboy. When such magazines are placed in a public area of a store, minors may be able to gain access to them without having to purchase them. Many States have therefore established a prohibition on the public display of material that is harmful to minors. Such laws effectively require "harmful-to-minors" material to be placed behind a blinder rack, in a sealed wrapper, in an opaque cover, in a separate room, or behind the counter. See Addendum II, *infra*, 3a.

This Court was presented with a facial challenge to one such law in *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383 (1988). The statute at issue in *American Booksellers* made it unlawful to display material that was "harmful to juveniles" in a manner that permitted juveniles to examine and peruse the material, and defined "harmful to juveniles" in much

the same way that the statute in *Ginsberg* defined "harmful to minors." *Id.* at 386-387. The district court held the statute unconstitutional, on the ground that it impermissibly interfered with adult access to nonobscene works, and the court of appeals affirmed. *Id.* at 391.

In this Court, the plaintiffs argued that the display prohibition applied to as much as 25% of a typical bookseller's stock, and cited 16 examples of valuable works that allegedly were covered. 484 U.S. at 394-395. The State, by contrast, argued that the law covered only "a very few 'borderline' obscene works," and none of the plaintiffs' examples. *Id.* at 394. This Court noted that, if the State's description of the statute's coverage was accurate, it would affect "substantially" the cost of complying with the law, and the burden on adult access to speech would be "dramatically altered." *Ibid.* Accordingly, rather than addressing the merits, the Court certified to the Virginia Supreme Court the question whether any of the 16 books introduced as plaintiffs' exhibits were covered by the statute. *Id.* at 398.

In *Commonwealth* v. *American Booksellers Ass'n*, 372 S.E.2d 618 (1988), the Virginia Supreme Court answered the certified question by holding that none of 16 books fell within the ambit of the state statute. The court construed the statute as not applying to works that "have serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents." *Id.* at 624. The court then concluded that although the 16 books "vary widely in merit, none of them lacks 'serious literary, artistic, political or scientific value'" for that group of minors. *Ibid.* The books at issue included A. Comfort & J. Comfort, *The Facts of Love* (1979), and *The New Our Bodies Ourselves* (J. Pincus and W. Sanford eds. 1984). 372 S.E. 2d at 622.

The Facts of Love contains graphic drawings of the human anatomy, and both books contain explicit, but informative, discussions of sexual acts. *Facts of Love*, at 25-55; *The New Our Bodies Ourselves*, at 164-197.[1]

After the Virginia Supreme Court's decision, this Court remanded the case to the Fourth Circuit for reconsideration in light of that decision. On remand, the Fourth Circuit upheld the constitutionality of the state statute, stating that it "agree[d] with the Virginia Supreme Court that the amendment to the statute places a minimal burden on booksellers and represents a constitutionally permissible exercise of the state's police powers." *American Booksellers Ass'n* v. *Virginia*, 882 F.2d 125, 127-128 (1989). This Court then denied certiorari. 494 U.S. 1056 (1990).

Other courts of appeals and state courts have similarly upheld the constitutionality of state statutes that prohibit the public display of "harmful-to-minors" material. Despite claims that such laws impose unacceptable burdens on adult access to speech, those courts have held that the laws constitutionally further the government's interest in protecting minors from material that is harmful to them. *Crawford* v. *Lungren*, 96 F.3d 380 (9th Cir. 1996), cert. denied, 520 U.S. 1117

[1] The other 14 books at issue in *Virginia* v. *American Bookseller* were: R. Bell, *Changing Bodies, Changing Lives* (1980); J. Betancourt, *Am I Normal?* (1983); J. Blume, *Forever* (1975); P. Blumstein & P. Schwartz, *American Couples* (1983); J. Collins, *Hollywood Wives* (1983); S. Donaldson, *Lord Foul's Bane* (1977); *The Family of Woman* (J. Mason ed. 1979); P. Haines, *The Diamond Waterfall* (1984); J. Joyce, *Ulysses* (1961); J. Lindsey, *Tender is the Storm* (1985); L. Niven & J. Pournelle, *Lucifer's Hammer* (1977); *The Penguin Book of Love Poetry* (J. Stallworthy ed. 1973); M. Sheffield, *Where Do Babies Come From?* (1972); and J. Updike, *The Witches of Eastwick* (1984). See 372 S.E.2d at 622.

(1997); *American Booksellers* v. *Webb*, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991); *M.S. News Co.* v. *Casado*, 721 F.2d 1281 (10th Cir. 1983); *Upper Midwest Booksellers Ass'n* v. *City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *Davis-Kidd Booksellers, Inc.* v. *McWherter*, 866 S.W.2d 520, 526-529 (Tenn. 1993); *American Booksellers Ass'n* v. *Rendell*, 481 A.2d 919, 941-942 (Pa. Super. Ct. 1984); but see *Tattered Cover, Inc.* v. *Tooley*, 696 P. 2d 780 (Colo. 1985).

3. The Web threatens to render state harmful-to-minors laws largely meaningless. There are literally thousands of pornographic sites on the Web. Those sites often offer "teasers"—free pornographic images designed to entice users to pay a fee to explore the whole site. H.R. Rep. No. 775, *supra*, at 7, 10. Minors today can search the Web as easily as they can change television channels. *Id.* at 9-10. Thus, in the privacy of their homes or those of friends, unsupervised minors can, with the click of a mouse, visit one pornographic site after another, and view and then print one set of pornographic teasers after another.

In adopting COPA, Congress sought to address that serious problem. Responding to this Court's holding in *Reno* v. *ACLU*, 521 U.S. at 865-866, 877-878, that the CDA suffered from vices not shared by state harmful-to-minor laws, and drawing on the successful experience that States have had with harmful-to-minors display laws, Congress adopted the same basic approach for the Web that States have adopted for local stores. Like those display laws, COPA does not ban the sale of harmful-to-minors material. Instead, it simply requires that the same kind of material that States require to be placed behind blinder racks must be placed behind adult identification screens or otherwise shielded from minors who are surfing the Web. See H.R. Rep. No.

775, *supra*, at 15 (By requiring "age verification before pornography is made available," COPA in effect requires commercial online pornographers "to put sexually explicit images 'behind the counter.'"); 144 Cong. Rec. H9910 (daily ed. Oct. 7, 1998) (remarks of Rep. Wilson) ("we are really doing no more than is required by most Circle K's or convenience stores").

Because COPA uses the same harmful-to-minors standard as state display laws, its scope is similarly narrow. Like those laws, COPA applies to pornographic material such as pictures that appear in Hustler, Penthouse, and Playboy. Like those laws, and unlike the CDA, COPA does not apply to material that has serious value for a legitimate minority of older minors, such as the use of graphic language to make a serious or humorous point, discussions about prison rape, discussions about safe sex, or the kind of artistic paintings of nude subjects that are displayed in the National Gallery of Art. Compare *Reno* v. *ACLU*, 521 U.S. at 873, 877-878. Moreover, like the state display laws, COPA's harmful-to-minors standard does not impose an undue burden on protected speech. Instead, its principal effect is simply to require commercial pornographers who already place most of their pornographic material behind adult verification screens to place their pornographic teasers behind those screens as well. COPA's harmful-to-minors standard is therefore firmly grounded in widely accepted and constitutionally sound state harmful-to-minors laws.

B. Community Standards Are An Established Component Of Obscenity And Harmful-To-Minors Laws

The court of appeals isolated one aspect of COPA's harmful-to-minors standard as constitutionally flawed —its reliance on community standards to help deter-

mine whether material is designed to appeal to the prurient interest of minors and is patently offensive with respect to minors. That reliance, however, is not unique to COPA. Community standards have long been a component of obscenity and harmful-to-minors statutes, and this Court has repeatedly approved their use.

The application of community standards in determining obscenity predated this Court's seminal decision in *Roth* v. *United States*, 354 U.S. 476 (1957). See *id.* at 488-489 & n.26. In *Roth*, the Court upheld the constitutionality of applying "contemporary community standards" to determine whether material is obscene. *Ibid.* The statute upheld in *Ginsberg* similarly applied to material that was "patently offensive *to prevailing standards in the adult community as a whole* with respect to what is suitable material for minors." 390 U.S. at 646 (emphasis added). In *Miller* v. *California*, 413 U.S. 15, 30-34 (1973), the Court reaffirmed that, in enforcing obscenity laws, States are free to apply "community standards" rather than a hypothetical "national standard" in determining what is designed to appeal to the "prurient interest" or what is "patently offensive." And in subsequent cases, the Court has upheld the constitutionality of applying "community standards" in deciding those issues under federal obscenity laws. *Sable*, 492 U.S. at 124-126; *Hamling* v. *United States*, 418 U.S. 87, 106 (1974); *United States* v. *12 200-Foot Reels of Super 8 M.M. Film*, 413 U.S. 123, 129-130 (1973). State harmful-to-minors laws, including display laws, similarly incorporate "community standards" to determine whether material is designed to appeal to the prurient interest of minors, is patently offensive with respect to minors, or both. See Addendum III, *infra*, 4a-5a.

Far from treating community standards as constitutionally suspect, this Court has always viewed community standards as furnishing an indispensable First Amendment safeguard. Early lower court obscenity cases had permitted obscenity to be judged by its effect upon "particularly susceptible persons." *Roth*, 354 U.S. at 489. In *Roth*, the Court rejected that standard as inconsistent with the First Amendment, and approved application of community standards as a safeguard against the censoring of works that legitimately address sexual issues. 354 U.S. at 488-489. In *Miller*, the Court emphasized the crucial role of community standards, explaining that they ensure that material "will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person." 413 U.S. at 33. And in *Hamling*, 418 U.S. at 107, the Court reiterated that the application of community standards "assure[s] that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group."[2]

C. It Is Appropriate To Require A Nationwide Business To Conform To Community Standards Throughout The Country

1. The court of appeals acknowledged that community standards could be applied constitutionality in all contexts other than the Internet and the Web. Pet.

[2] Under this Court's decisions, the legislature is free to define community standards in terms of a particular statewide community, a particular local community within a State, or without any geographic specification. *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974); *Miller*, 413 U.S. at 33-34. In COPA, Congress has chosen to have juries instructed to apply community standards without geographic specification. See p. 38, *infra*.

App. 35a. The court held, however, that community standards could not be applied constitutionally to the Web. Based on the determination that there is no technology on the Web that permits a Web site operator to limit a communication to a particular geographic area, it concluded that applying community standards to the Web effectively means that a commercial Web site must place behind an age verification screen the material that offends the most puritan community. *Id.* at 24a-25a. The court viewed that burden as constitutionally impermissible. *Id.* at 29a.

The court of appeals' belief that there is no way for a Web site operator to avoid disseminating its material to a particular geographic community is incorrect. As discussed in the footnote below, a Web business can target particular geographic areas.[3] Even if we accept

[3] In support of its conclusion, the court of appeals cited a finding of the district court. Pet. App. 24a. The district court found that, once a Web site "chooses to make [material] available to all, it generally cannot prevent that content from entering any geographic community." *Id.* at 62a. The district court's limited finding does not support the court of appeals' broader conclusion that there is no way at all in which a web site operator can limit its material to particular geographic communities. For example, a Web business can require persons who wish to gain access to its site to register and obtain a password before they can proceed further. The online version of the *New York Times*, for example, requires such registration in order to gain access to all but the first page of its Web site. See http://www.nytimes.com. Following that model, a Web publisher could obtain name and address information through a registration process, and then mail passwords to the addresses provided at registration, limiting such mailings to the geographic areas of its choice. Compare *United States* v. *Thomas*, 74 F.3d 701, 705 (6th Cir. 1996) (upholding application of community standards to electronic bulletin board, noting that access to the board was "limited to members who were given a password after they paid a membership fee and submitted a signed application

for present purposes the premise of the court of appeals' holding—that COPA effectively requires Web businesses to conform to community standards throughout the country concerning what material must be placed behind an age verification screen—that consequence does not violate the First Amendment.

2. As already discussed, the Court in *Miller* upheld the constitutionality of applying community standards rather than uniform national standards in determining whether material appeals to the prurient interest and is patently offensive. 413 U.S. at 30-34. The inevitable consequence of that approval is that a person who chooses to conduct a nationwide business or to operate a business on a nationwide medium must observe community standards throughout the nation.

There is nothing "unreasonable" about that consequence. Pet. App. 33a. When a commercial entity chooses to conduct a nationwide business or to operate on a nationwide medium, like the Web, and to regularly display harmful-to-minors material, it obtains the advantages of a nationwide market for its profit-making activities. It is entirely reasonable to require busi-

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form" that "requested the applicant's age, address, and telephone number"). In addition, developing technologies now permit a Web business to determine instantly a content receiver's geographical identity based on the Internet protocol (IP) address of the user's computer. J. Goldsmith & A. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 810 (2001). See *Interim Order, Ligue Contre le Racisme et l'Antisemitisme* v. *Yahoo! Inc.*, No. Rg: 00/05308 (T.G.I. Paris, Nov. 20, 2000) (detailing ways in which Yahoo! Inc., could block access from France to sites auctioning Nazi memorabilia). See also M. Richtel, *High Stakes in the Race to Invent a Bettor-Blocker*, N.Y. Times, June 28, 2001, at E6 (describing efforts of online gambling companies to avoid liability by restricting access by persons from countries where such gambling is illegal).

nesses that have made that choice and that have reaped that economic advantage to make sure that their business activities do not cause harm to minors in the communities from which they seek to profit.

3. This Court's decisions in *Hamling* and *Sable* support that conclusion. *Hamling* involved a criminal prosecution under 18 U.S.C. 1461 for mailing obscene material. The Court upheld the constitutionality of applying community standards rather than uniform national standards to determine the issue of obscenity under that statute. 418 U.S. at 106-107. In dissent, Justice Brennan argued that application of community standards under the mail statute violated the First Amendment. He contended that "[n]ational distributors choosing to send their products in interstate travels will be forced to cope with the community standards of every hamlet into which their goods may wander," and that rather than "risking the expense and difficulty of defending against prosecution in any of several remote communities," national distributors will "retreat to debilitating self-censorship." *Id.* at 144. The Court rejected Justice Brennan's argument that exposing a national distributor to potentially varying community standards imposed an impermissible burden on protected speech. *Id.* at 106. The Court stated that "[t]he fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit [their] materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity." *Ibid.*

In *Sable*, 492 U.S. at 124-126, the Court upheld the constitutionality of the prohibition in 47 U.S.C. 223(b) against obscene telephone messages. The Court rejected Sable's argument that the statute violated the

First Amendment because it effectively "compell[ed]" those who operate dial-a-porn businesses "to tailor all their messages to the least tolerant community." 492 U.S. at 124-126. The Court read *Hamling* to foreclose the argument that the need to comply with potentially varying community standards renders a federal statute unconstitutional. *Id.* at 125. The Court further noted that "Sable is free to tailor its messages, on a selective basis, if it so chooses, to the communities it chooses to serve." *Ibid.* While the development of a system to screen calls might involve some costs, the Court concluded, "there is no constitutional impediment to enacting a law which may impose such costs on a medium electing to provide these messages." *Ibid.* Ultimately, the Court viewed the question of how to comply with a statute that may be triggered by varying community standards to be one "for the message provider to make." *Ibid.* The Court explained that "[t]here is no constitutional barrier * * * to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others. If Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages." *Id.* at 125-126.

4. The court of appeals sought to distinguish *Hamling* and *Sable* on the ground that the parties involved in those cases "had the ability to control the distribution of controversial material with respect to the geographic communities into which they released it." Pet. App. 26a. "By contrast," the court stated, "Web publishers have no such comparable control." *Ibid.* As we have pointed out, see note 3, *supra*, Web businesses

can control—albeit at some expense—the distribution of their materials into particular geographic areas.

More fundamentally, *Hamling*'s and *Sable*'s approval of the application of varying community standards did not depend on the ability of the parties in those cases to exercise geographic control over the material they distributed. *Hamling* did not mention geographic control as a factor in its analysis. While *Sable* noted the distributor's ability to exercise geographic control (albeit by incurring "some cost[]") as a further factor supporting the constitutionality of the prohibition against obscene telephone messages, it held that, regardless of that factor, "Sable ultimately bears the burden of complying with the prohibition on obscene messages." *Sable*, 492 U.S. at 125-126.

Thus, the principle that emerges from *Hamling* and *Sable*, and the inevitable consequence of *Miller*'s approval of community standards, is that a business that chooses to engage in commercial conduct that has effects in more than one community has the responsibility to ensure that those effects are lawful in each of the affected communities. That principle applies as much to commercial pornographers on the Web as to the parties involved in *Hamling* and *Sable*.

D. The Harmful-To-Minors Test Significantly Circumscribes The Types of Material Covered By COPA

The court of appeals' view that community standards cannot be applied constitutionally to the Web was premised in large part on its assumption that COPA's reliance on community standards effectively requires "vast amounts" of worthwhile material to be placed behind adult verification screens. Pet. App. 25a. The harmful-to-minors test, however, narrowly cabins the material that is covered by the Act, so that COPA

applies primarily to pornographic teasers that appear on the Web sites of commercial pornographers. Thus, if COPA requires vast amounts of material on the Web to be placed behind screens, it is only because commercial pornographers display so many pornographic teasers.

The serious value prong, in particular, significantly circumscribes the types of material subject to COPA. In *Pope* v. *Illinois*, 481 U.S. 497 (1987), the Court held that the serious value prong of the *Miller* obscenity standard does not incorporate community standards. The Court explained that "insofar as the First Amendment is concerned, * * * the value of the work [does not] vary from community to community based on the degree of local acceptance it has won." *Id.* at 500. Instead, the proper inquiry is "whether a reasonable person would find * * * value in the material, taken as a whole." *Id.* at 500-501. Moreover, "the mere fact that only a minority of a population may believe a work has serious value does not mean the 'reasonable person' standard would not be met." *Id.* at 501 n.3.

In the context of state harmful-to-minors display laws, that has meant that material is excluded from coverage if it has "serious literary, artistic, political, or scientific value for a legitimate minority of normal, older adolescents." *Commonwealth* v. *American Bookseller Ass'n*, 372 S.E.2d at 624; see also *Davis-Kidd Booksellers*, 866 S.W.2d at 528. Thus, pornographic magazines, like Hustler, Penthouse, and Playboy, must be put behind blinder racks, while books that contain serious and informative discussions about sexual acts need not. See pp. 23-24 & note 1, *supra*. COPA's serious value prong draws that same line. H.R. Rep. No. 775, *supra*, at 13 (COPA adopts the same standard as state harmful-to-minors display laws); *id.* at 27-28 (COPA incorporates the standard set forth in *Pope*).

That component of COPA, entirely ignored by the court of appeals, effectively limits COPA's reach to a narrow band of material.

Moreover, because the serious value prong does not incorporate community standards, appellate court enforcement of its limitations can be particularly effective. As this Court explained in *Reno* v. *ACLU*, the serious value prong "allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value." 521 U.S. at 873. The Virginia Supreme Court performed that function in *American Booksellers*, providing clear guidance on what must be placed behind blinder racks or otherwise shielded from examination by minors. 372 S.E.2d at 624. Appellate courts can perform the same function in enforcing COPA's serious value limitation.

Other elements of COPA also place legal limits on what may be found to fall within the scope of the statute. For example, material is covered by the first prong—appeal to the prurient interest—only if it is, "in some significant way, erotic." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 213 & n.10 (1975). That requirement excludes as a matter of law pictures of a nude baby, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. *Ibid.* It also excludes, as a matter of law, the seven-dirty-words monologue at issue in *Pacifica*, and other similar non-erotic uses of graphic language. See *FCC* v. *Pacifica Found.*, 438 U.S. 726, 739 (1978).

Similarly, material is covered by the second prong—"patent offensiveness"—only if it falls within one of the specifically defined categories of depictions: "an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd

exhibition of the genitals or post-pubescent female breast." 47 U.S.C. 231(e)(6)(B) (Supp. V 1999). Thus, COPA does not apply to a picture of a scantily clad belly dancer, the typical cover of Cosmopolitan or Vogue, or scenes from Britney Spears' Pepsi commercial, no matter how erotic some minors might find such depictions. Like the legal limitations on what can be found to lack serious value, the legal limitations on what can be found to satisfy the first two prongs of the harmful-to-minors statute can be enforced by a reviewing court. See *Jenkins* v. *Georgia*, 418 U.S. 153, 159-161 (1974) (establishing substantive limits on what may be deemed "patently offensive" with respect to adults, and stating that "it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is 'patently offensive'").

Thus, all three prongs of the harmful-to-minors standard place effective legal limits on what can be found to fall within the scope of the statute. Together, they confine COPA's coverage "to materials that are clearly pornographic," while excluding as a matter of law "entertainment, library, or news materials that merely contain nudity or sexual information, regardless of how controversial they may be for their political or sexual viewpoints." H.R. Rep. No. 775, *supra*, at 28. See also S. Rep. No. 225, *supra*, at 13 ("This definition ensures that the bill may not be construed as to restrict access to public health information, art, literature, and political information.").

E. Community Standards Concerning What Is Harmful To Minors Are Likely To Be Reasonably Constant

The constitutionality of applying community standards to the Web is further supported by Congress's judgment that, on the relevant issues, community standards are likely to be "reasonably constant" throughout the country. H.R. Rep. No. 775, *supra*, at 28. The court of appeals cast that judgment aside, finding no evidence that "adults everywhere in America would share the same standards for determining what is harmful for minors." Pet. App. 31a (emphasis deleted). Congress did not assume, however, that communities everywhere would have precisely the same understanding of what is prurient and patently offensive with respect to minors. Instead, Congress concluded that the standard applied to those issues is likely to be *reasonably* constant. As applied to the narrow band of material that lacks serious value for a legitimate minority of older minors and is not excluded from coverage under the first two prongs as a matter of law, that judgment is firmly grounded in common sense.

The exhibits introduced in this case provide a concrete context for assessing the reasonableness of Congress's judgment that community standards are likely to be "reasonably constant" throughout the country. See 2 C.A.J.A. 758-812 (Gov't Exhs.); *id.* at 601-757 (Pl's Exhs.).[4] As even a brief glance at the government exhibits in the court of appeals appendix reveals, all of them likely would be viewed as prurient and patently offensive with respect to minors throughout the country. A number of respondents' exhibits, by contrast, would be excluded from coverage as a matter of law by one or more of the three prongs of the harmful-to-minors standard. Some of respondents' exhibits, however, plainly do test, and likely exceed, the legal limitations imposed by those three prongs. But there is no reason to believe that those exhibits would be assessed

[4] "C.A.J.A." refers to the joint appendix filed in the court of appeals. That joint appendix has been lodged with this Court.

differently by different communities with respect to whether they are prurient and patently offensive for minors. Indeed, the court of appeals did not identify a single exhibit as to which coverage under COPA would depend on which community in the country evaluated the material.

Congress's judgment that community standards are likely to be reasonably constant in the present context does not conflict with the observation in *Miller* that communities throughout the country may vary on whether material is obscene for adults. Pet. App. 32a (quoting *Miller*, 413 U.S. at 30, 33). Even if the average adults in a particular locality or State might feel that adults should have relatively free access to pornographic material, there is no reason to believe that those same adults would want *minors* in the locality or State to be exposed to such material. Moreover, there is every reason to expect a far greater degree of agreement from community to community concerning what appeals to the prurient interest and is patently offensive with respect to minors on a nationwide and readily accessible medium like the Web.

Congress's direction that juries should be instructed in terms of an "adult" standard rather than a "geographic" standard further promotes a reasonably constant application of community standards. H.R. Rep. No, 775, *supra* at 28. That direction means that juries should not be instructed to consider the community standards of a particular geographic area, such as a city, town, judicial district, or State. Instead, as authorized by *Jenkins*, 418 U.S. at 157, a jury should be instructed to consider the standards of the adult community as a whole, without geographic specification, concerning what materials appeal to the prurient interest and are patently offensive with respect to

minors. To promote a reasonably constant application of standards, juries should also be instructed to take into account the fact that the Web is a national medium.

The possibility that the situs of the jury would matter in some cases cannot be discounted entirely. But "[t]he mere fact that juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged." *Miller*, 413 U.S. at 26 n.9.

F. COPA's Reliance On Community Standards Does Not Unduly Burden Speech

1. Because COPA sharply limits the material that is potentially covered, and there is little community-to-community variance as to the remainder, COPA's reliance on community standards does not impose an undue burden on speech. As we have discussed, COPA applies primarily to Web sites that are devoted to commercial pornography. The operators of those sites already put most of their material behind age verification screens. COPA's principal effect is to require those commercial pornographers to place their free teasers behind adult verification screens as well. Moreover, because all the pornographic material that commercial pornographers display is likely to offend community standards with respect to children throughout the country, they would have to put all such material behind age verification screens, regardless of whether it would be evaluated by a jury in the situs of the place of posting, a jury in Las Vegas, or a jury in Mississippi. *Miller*, 413 U.S. at 32. Any burden that COPA imposes on them cannot be attributed to variance in community standards.

COPA's reliance on community standards also imposes no costs on Web sites that display sexual material

that has serious value for a legitimate minority of older minors. The operators of those Web sites have no obligation to place their material behind a screen, and any variances in community standards are irrelevant for them. Similarly, because COPA applies only to entities that display harmful material regularly and for profit, see 47 U.S.C. 231(e)(2)(B) (Supp. V 1999), COPA's reliance on community standards does not impose any costs on commercial entities that display harmful-to-minors material on isolated occasions.

COPA's reliance on community standards also does not impose an undue burden on businesses that do not operate sites dedicated to pornography, but nonetheless regularly display material that may be harmful to minors. As to material that lacks serious value for older minors and is not excluded as a matter of law from the first two prongs, such businesses, like commercial pornographers, could not reasonably expect that juries in different communities would react differently to the material. They would therefore likely screen all such material, regardless of the relevant community standard. As a result, any burden they experience would not be attributable to a variance in community standards, but to the fact that material that is not excluded from the statute as a matter of law is reasonably likely to be prurient and patently offensive with respect to minors throughout the country.

2. Even if we assume that there nevertheless remains some meaningful variance in community standards, the sole consequence would be to require some additional age screening. That consequence does not unduly burden speech.

Web sites can easily set up a system for placing harmful material behind an adult verification screen. One adult verification service, Adult Check, will set up

such a system at no cost to the Web site. Pet. App. 75a. In fact, Web sites can earn substantial commissions from Adult Check if users sign up with Adult Check in order to view that Web site's screened content. *Ibid.* At the time of the district court's decision, nearly 46,000 Web sites were using Adult Check. *Id.* at 76a. A variance in community standards therefore would not impose an undue burden on commercial Web sites that regularly display material that may be harmful to minors.

Nor would a variance in community standards impose an undue burden on adults who wish to view material that might be found to be harmful to minors in some communities, but not others. At the time of the district court's decision, at least 25 services provided adult identification numbers that enabled users to gain access to screened content. Pet. App. 75a. Adults could obtain an Adult ID from Adult Check for $16.95 per year, and approximately three million people had a valid Adult Check PIN. *Id.* at 76a. COPA also removes disincentives to obtaining an Adult ID by requiring that information collected in that process must be kept confidential. 47 U.S.C. 231(d)(1) (Supp. V 1999).

As the district court found, some adults may still be deterred from obtaining an Adult ID. Pet. App. 89a. But since COPA provides significant privacy protections for adults who seek to obtain an Adult ID, and millions of adults have had no difficulty obtaining and using Adult IDs, the reluctance of some adults to obtain an Adult ID does not render COPA unconstitutional.

Any burden that COPA's reliance on community standards imposes, moreover, must be balanced against the interests that it serves. This Court has held that the government has a compelling interest in protecting children from pornographic material that is harmful to

them, even if the material is not obscene by adult standards, *Sable*, 492 U.S. at 126, and community standards are critical in serving that interest. See pp. 26-28, *supra*. Indeed, the court of appeals assumed for purposes of its decision in this case that "there may be no other means by which harmful material on the Web may be constitutionally restricted." Pet. App. 3a. In these circumstances, any burden that COPA's reliance on community standards imposes is outweighed by the interests it serves.

The cases upholding state display laws demonstrate that a statute that serves the compelling interest of protecting children from harmful material is not unconstitutional simply because it imposes some burden on adult access to pornographic material. For example, in *Crawford* v. *Lungren*, the plaintiffs claimed that a statute banning the sale of harmful matter in unsupervised sidewalk vending machines would "likely make it commercially infeasible for the publishers [of such matter] to distribute their materials through vending machines." 96 F.3d at 383. The Ninth Circuit nonetheless upheld the constitutionality of the statute, emphasizing that "[t]he statute provides two defenses which allow for the retention of newsracks," and that while those defenses "may impose some economic burden, they do enable the publishers to continue distributing their publications on streets." *Id.* at 388. Similarly, in *American Booksellers* v. *Webb*, the Eleventh Circuit upheld a state display restriction despite a district court finding that "in-store display of books" is "the cornerstone of the [bookselling] industry's marketing practices." 919 F.2d at 1498. In *M.S. News Co.* v. *Casado*, the Tenth Circuit upheld an ordinance requiring blinder racks in front of harmful-to minors material even though the court acknowledged that "compliance

with the ordinance will to some degree restrict the viewing by adults of materials which are, as to adults, constitutionally protected." 721 F.2d at 1288. Other courts have reached the same conclusion.[5]

G. COPA's Reliance On Community Standards Is Consistent With *Reno* v. *ACLU*.

In *Reno* v. *ACLU*, the Court noted that one feature of the CDA was that "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." 521 U.S. at 877-878. The Court made that observation, however, in connection with a statute that it found to be of unprecedented vagueness and breadth. In particular, the CDA applied to materials that were "indecent" or "patently offensive," without defining either term; it did not require that the covered material "appeal to the prurient interest"; it did not make clear whether the

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[5] See *Upper Midwest Booksellers Ass'n* v. *City of Minneapolis*, 780 F.2d at 1394 (upholding display ordinance that "limits to some extent the ability of adults to visit a bookstore or newsstand and browse through material that is obscene as to children but not as to adults"); *Davis-Kidd Booksellers, Inc.*, 866 S.W.2d at 526 (upholding display statute despite testimony that "blinder racks, accompanied by reasonable steps to prevent perusal by children, would disrupt business practices"); *Commonwealth* v. *American Booksellers Ass'n*, 372 S.E.2d at 625 (concluding that display statute "imposes a relatively light burden upon the bookseller, in contrast to the state's interest in protecting juveniles from materials harmful to them"); *American Booksellers Ass'n* v. *Rendell*, 481 A.2d at 941 (dismissing "any inhibitory effect on dissemination to adults" in light of "the state's legitimate interest in shielding children from these materials"); but see *Tattered Cover*, 696 P.2d at 783-785 (state display law violates First Amendment where only means of compliance are commercially infeasible).

"indecent" and "patently offensive" determinations should be made with respect to adults or minors; and it did not require that covered material lack "serious literary, artistic, political, or scientific value." 521 U.S. at 865, 871, & n.37, 873, 877-878. The CDA also applied not only to commercial entities, but also to non-profit entities and individuals posting material on their computers. *Id.* at 856, 877. Given the breadth and vagueness of the CDA and the absence of any effective legal limits on what it encompassed, application of community standards effectively permitted the community most likely to be offended to determine the scope of the statute's coverage in most respects. In that context, the CDA's reliance on community standards exacerbated the inherent constitutional difficulties with the statute.

In COPA, Congress responded directly to the Court's concern about the unprecedented breadth and undefined parameters of the CDA. COPA defines harmful-to-minors material in terms that have been well understood since this Court's decision in *Ginsberg*; it does not cover material unless it is designed to appeal to the prurient interest of minors; it specifies the particular sexual acts and parts of the anatomy the depiction of which can be found to be patently offensive; it makes clear that the prurient interest and patently offensive determinations should be made "with respect to minors"; it does not cover material that has serious value for a legitimate minority of older minors; and it applies only to businesses that regularly and for profit display harmful-to-minors material. For the reasons we have discussed, in the context of that very different statute, a reliance on community standards does not raise independent constitutional concerns. Nothing in *Reno* v. *ACLU* suggests otherwise.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to that court for further proceedings.

Respectfully submitted.

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ADDENDUM I

State laws that prohibit the sale to minors of harmful-to-minors material:

Ala. Code § 13A-12-200.5(1) (1994 & Supp. 2000); Ariz. Rev. Stat. Ann. § 13-3506.A (West 2001), *re-printed in* as amended 2001 Ariz. Legis. Serv. Ch. 94 (West); Ark. Code Ann. § 5-68-502(2)(A) (Michie Supp. 1999); Cal. Penal Code § 313.1(a) (West Supp. 2000); Colo. Rev. Stat. Ann. § 18-7-502(1) (West 1986); Conn. Gen. Stat. § 53a-196 (1994); Del. Code Ann. tit. 11, § 1365(i) (1995); D.C. Code Ann. § 22-2001(b)(1)(A) (1996); Fla. Stat. Ann. § 847.012(2) (West 2000); Ga. Code Ann. § 16-12-103(a) (1999); Haw. Rev. Stat. § 712-1215(1) (1999 & Supp. 2000); Idaho Code § 18-1515.1 (1997); Ind. Code Ann. § 35- 49-3-3(1) (West 1998); Iowa Code Ann. § 728.2 (West 1993); Kan. Stat. Ann. § 21-4301c(a)(2) (1995); Ky. Rev. Stat. Ann. § 531-030(1) & commentary (Banks-Baldwin 1995); La. Rev. Stat. Ann. § 14:91.11(A)(1) (West Supp. 2001); Me. Rev. Stat. Ann. tit. 17, § 2911(2) (West 1983 & Supp. 2000); Mass. Ann. Laws ch. 272, § 28 (Law. Co-op. 1992); Minn. Stat. Ann. § 617.293 (West 1987 & Supp. 2001); Mo. Ann. Stat. § 573.040 (West 1995 & Supp. 2001); Mont. Code Ann. § 45-8-206(1)(b) (1999); Neb. Rev. Stat. § 28-808(1) (1995 & Supp. 2001); Nev. Rev. Stat. Ann. § 201-265.1 (Michie 1997); N.H. Rev. Stat. Ann. § 571-B:2.I (1986); N.M. Stat. Ann. § 30-37-2 (Michie 1997); N.Y. Penal Law § 235.21.1 (McKinney 2000); N.C. Gen. Stat. § 14-190.15(a) (1999); N.D. Cent. Code § 12.1-27.1-03 (1997); Ohio Rev. Code Ann. § 2907.31(A) (West 1997); Okla. Stat. Ann. tit. 21, § 1040-76.2 (West Supp. 2001); 18 Pa. Cons. Stat. Ann. § 5903(c) (West 2000 & Supp. 2001); R.I. Gen. Laws § 11-31-10(b) (2000); S.C. Code Ann.

§ 16-15-385(A) (Law. Co-op. Supp. 2000); S.D. Codified Laws § 22-24-28 (Michie 1998); Tenn. Code Ann. § 39-17-911(a) (1997 & Supp. 2000); Tex. Penal Code Ann. § 43.24(b) (West 1994); Utah Code Ann. § 76-10-1206(1)(a) (1999 & Supp. 2000); Vt. Stat. Ann. tit. 13, § 2802(a) (1998 & Supp. 2000), *reprinted in* as amended 2001 Vt. Acts & Resolves 41, § 6; Va. Code Ann. § 18.2-391.A (Michie Supp. 2000), *reprinted* as amended 2001 Va. Acts ch. 451, § 1; Wash. Rev. Code Ann. 9.68.060(3)(d) (West 1998); Wis. Stat. Ann. § 948.11(2) (West 1996 & Supp. 2000).

ADDENDUM II

State laws that prohibit the display of harmful-to-minors material:

Ala. Code § 13A-12-200.5(2)a. (Supp. 2000); Ariz. Rev. Stat. Ann. § 13-3507 (West 2001); Ark. Code Ann. § 5-68-502(1)(A) (Michie Supp. 1999); Cal. Penal Code § 313.1(c)(2) (West Supp. 2000); Colo. Rev. Stat. Ann. § 18-7-502(5) (West 1986); Del. Code Ann. tit. 11, § 1365(i) (1995); Fla. Stat. Ann. § 847.0125(2) (West 2000); Ga. Code Ann. § 16-12-103(e) (1999); Ind. Code Ann. § 35-49-3-3(2) (West 1998); Iowa Code Ann. § 728.2 (West 1993); Kan. Stat. Ann. § 21-4301c(a)(1) (1995); La. Rev. Stat. Ann. § 14:91.11(A)(1) and (B) (West Supp. 2001); Me. Rev. Stat. Ann. tit. 17, § 2912 (West 1983 & Supp. 2000); Minn. Stat. Ann. § 617.293.2 (West Supp. 2001); Mont. Code Ann. § 45-8-206(1)(a) (1999); Nev. Rev. Stat. Ann. § 201-265.2 (Michie 1997); N.M. Stat. Ann. § 30-37-2 (Michie 1997); N.C. Gen. Stat. § 14-190.14 (1999); Ohio Rev. Code Ann. § 2907-311 (West 1997); Okla. Stat. Ann. tit. 21, § 1040.76.1 (West Supp. 2001); 18 Pa. Cons. Stat. Ann. § 5903(a)(1) (West 2000 & Supp. 2001); R.I. Gen. Laws § 11-31-10(b) (2000); Tenn. Code Ann. § 39-17-914 (1997 & Supp. 2000); Vt. Stat. Ann. tit. 13, § 2804b (1998); Va. Code Ann. § 18.2-391.A (Michie Supp. 2000), *reprinted in* as amended 2001 Va. Acts ch. 451, § 1.

ADDENDUM III

State laws that incorporate community standards into harmful-to-minors definitions:

Ala. Code § 13A-12-200.1(11) (Supp. 2000); Ariz. Rev. Stat. Ann. § 13-3501.1 (West 2001), *reprinted in* as amended 2001 Ariz. Legis. Serv. Ch. 94 (West); Ark. Code Ann. § 5-68-501(2) (Michie Supp. 1999); Cal. Penal Code § 313.1(a) (West Supp. 2000); Colo. Rev. Stat. Ann. § 18-7-501(2) (West 1986); Conn. Gen. Stat. § 53a-193(2) (1994); Del. Code Ann. tit. 11, § 1365(a)(1) (1995); D.C. Code Ann. § 22-2001(b)(1)(A) (1996); Fla. Stat. Ann. § 847.001(3) (West 2000), *reprinted in* as amended 2001 Fla. Sess. Law Serv. Ch. 2001-54 (West); Ga. Code Ann. § 16-12-102(1) (1999); Haw. Rev. Stat. § 712-1210(7) (1999); Idaho Code § 18.1514.6 (1997); Ind. Code Ann. § 35-49-2-2 (West 1998); Iowa Code Ann. § 728.1.5 (West 1993 & Supp. 2001); Kan. Stat. Ann. § 21-4301c(d)(2) (1995); La. Rev. Stat. Ann. § 14:91.11(A)(2) (West Supp. 2001); Me. Rev. Stat. Ann. tit. 17, § 2911.1(D)(1) (West 1983 & Supp. 2000); Mass. Ann. Laws ch. 272, § 31 (Law. Co-op. 1992); Mich. Comp. Laws Ann. § 722.674(a) (West 1993); Minn. Stat. Ann. § 617.292.7 (West 1987); Mo. Ann. Stat. § 573-010(11) (West Supp. 2001); Mont. Code Ann. § 45-8-205(1) (1999); Neb. Rev. Stat. § 28-807(6) (1995); Nev. Rev. Stat. Ann. § 201-257 (Michie 1997); N.H. Rev. Stat. Ann. § 571-B:1.I (1986); N.M. Stat. Ann. § 30-37-1.F (Michie 1997); N.Y. Penal Law § 235.20.6 (McKinney 2000); N.C. Gen. Stat. § 14.190.13(1) (1999); N.D. Cent. Code § 12.1-27.1-02.2 (1997); Ohio Rev. Code Ann. § 2907.01(E) (West 1999); Okla. Stat. Ann. tit. 21, § 1040-75.2 (West Supp. 2001), *reprinted in* as amended 2001 Okla. Sess. Law Serv. ch. 387 (West); 18 Pa. Cons. Stat. Ann.

§ 5903(e)(6) (West 2000 & Supp. 2001); R.I. Gen. Laws § 11-31-10(a)(1) (1996); S.C. Code Ann. § 16-15-375(1) (Law. Co-op. Supp. 2000); S.D. Codified Laws § 22-24-27(4) (Michie 1998); Tenn. Code Ann. § 39-17-901(6) (1997); Tex. Penal Code Ann. § 43.24(a)(2) (West 1994); Utah Code Ann. § 76-10-1201(11) (1999), *reprinted in* as amended 2001 Utah Laws 9, § 2115; Vt. Stat. Ann. tit. 13, § 2801(6) (1998); Va. Code Ann. § 18.2-390(6) (Michie 1996); Wash. Rev. Code Ann. § 9.68.050(2) (West 1998); Wis. Stat. Ann. § 948.11(1)(b) (West 1996 & Supp. 2000).